BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. NEWPORT-MESA UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2014051179 ORDER GRANTING DISTRICT'S MOTION TO QUASH STUDENT'S SUBPOENA DUECES TECUM

On July 1, 2014, Student served a subpoena duces tecum (SDT), dated June 26, 2014, on Newport-Mesa Unified School District (District). On July 9, 2014, District filed a motion to quash Student's SDT, in part or in its entirety. On July 16, 2014, Student filed opposition. On July 18, 2014, District filed a reply. As discussed below, District's motion to quash is granted in its entirety.

APPLICABLE LAW

In general, there is no right to prehearing discovery in due process proceedings under the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq. (IDEA)). Rather, the IDEA provides parties with the right to present evidence and compel the attendance of witnesses at "a hearing conducted pursuant to subsection (f) or (k)" of section 1415 of title 20 of the United States Code. (20 U.S.C. § 1415(h).) California provides a similar right to present evidence and compel the attendance of witnesses in due process proceedings (Ed. Code, § 56505, subd. (e)), but does not confer the right to prehearing discovery.

Education Code, section 56505, subdivision (a), provides that "[t]he state hearing shall be conducted in accordance with regulations adopted by the board," and under that authority the Department of Education promulgated section 3082, subdivision (c)(2), of title 5 of the California Code of Regulations, which authorizes the issuance of subpoenas and subpoenas duces tecum (SDT's). These regulations specifically disallow the provisions of the Administrative Procedures Act (APA) that provide broader authority for the use of subpoenas in other administrative hearings (5 Cal. Code Regs., tit. 5, § 3089, [inapplicability of Govt. Code, §§ 11450.05-11450.30 to due process hearing procedures].) Although the subpoena form created by the Office of Administrative Hearings (OAH) has options for production of documents under subpoena, not all of them may apply to special education matters, as OAH has jurisdiction over many types of non-IDEA disputes. While SDT's are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings, which accord prehearing access to two types of documents: (i) parents have the right to request and receive the pupil's educational records within five business days at any time (Ed. Code § 56504), and (ii) the parties are entitled to

receive copies of all the documents the educational agency intends to use at hearing, not less than five business days prior to the hearing. (Ed. Code § 56505, subd. (e)(7).)

Education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act (FERPA) to include "records, files, documents, and other materials" containing information directly related to a student, other than directory information, which "are maintained by an educational agency or institution or by a person acting for such agency or institution." (20 U.S.C. § 1232g(a)(4)(A); Ed.Code, § 49061, subd. (b).) Pupil or education records maintained by a school district employee in the performance of his or her duties include those "recorded by handwriting, print, tapes, film, microfilm or other means." (Ed. Code, §§ 49061, 56504.) Education records do not include "records of instructional, supervisory, and administrative personnel…which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." (20 U.S.C. § 1232g(a)(4)(b)(i); Ed. Code, § 49061, subd. (b).)

The United States Supreme Court in *Owasso Ind. School Dist. v. Falvo* (2002) 534 U.S. 426 [122 S. Ct. 934, 151 L.Ed.2d 896] (*Falvo)*, after conducting an analysis of FERPA provisions related to education records, determined that not every record relating to a student satisfies the FERPA definition of "education records." Specifically, the Supreme Court examined the FERPA provision that requires educational institutions to "maintain a record, kept with the education records of each student" (i.e., 20 U.S.C. § 1232g(b)(4)(A)), that "list[s] those who have requested access to a student's education records and their reasons for doing so." (*Falvo, supra,* 534 U.S. at p. 434.) The Court concluded that because this single record must be kept with the education records, "Congress contemplated that education records would be kept in one place with a single record of access." (*Id*.) The Court further concluded that "[b]y describing a 'school official' and 'his assistants' as the personnel responsible for the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar…" (*Id*. at pp. 434-435.)

In *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742 (*BRV)*, when determining whether or not an investigative report, which identified students in connection with alleged misconduct by a school district superintendent, was an education record, the Court of Appeal conducted an analysis of the "scant" judicial authority interpreting what constituted an education record. (*Id.* at pp. 751-755.) The Court of Appeal, citing *Falvo*, agreed with the Supreme Court, and stated that "the statute was directed at institutional records maintained in the normal course of business by a single, central custodian of the school. Typical of such records would be registration forms, class schedules, grade transcripts, discipline reports, and the like." (*Id.* at pp. 751-754.) The Court of Appeal then found that the investigative report, "which was not directly related to the private educational interests of the student," was not an education record, "as the report was not something regularly done in the normal course of business," and "was not the type of report regularly maintained in a central location along with education records…in separate files for each student." (*Id.* at p. 755.)

In *S.A. ex rel. L.A. v. Tulare County Office of Education* (N.D.Cal. Sept. 24, 2009) 2009 WL 3126322, aff'd. *S.A. v. Tulare County Office of Education* (N.D. Cal. October 6, 2009) 2009 WL 3296653 (*S.A.*), the district court found that documents such as school district emails concerning or personally identifying a student that had not been placed in his permanent file were not educational records as defined under FERPA. The court, citing *Falvo*, stated that Congress contemplated that educational records be kept in one place with a single record of access to those records. Because the emails student requested had not been placed in his permanent file, and were therefore not "maintained" by the school district, the emails were not educational records and the school district was therefore not required to produce them under a request for student records under the IDEA.

Special education law does not specifically address motions to quash subpoenas or SDT's. In ruling on such motions, the OAH relies by analogy on the relevant portions of Code of Civil Procedure, section 1987.1, which provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare, including protective orders.

DISCUSSION

Student's due process hearing request (complaint) alleges that Student, who is non-verbal, came home with unexplained scrapes and bruises and exhibited increased maladaptive behaviors during the 2013-2014 school year. At the request of Student's parents (Parents), Student was moved to another classroom, where District allegedly failed to implement the behavior supports called for in Student's individualized education program (IEP). Student's sole issue is whether District failed to provide him with a free appropriate public education by failing to implement Student's April 3, 2013 IEP.

The SDT directed to District requested "any and all documents (including email)" (1) relating to investigations of Student for the 2013-2014 school year, (2) relating to evaluations and reprimands of Student's first teacher in the 2013-2014 school year, (3) relating to evaluations and reprimands of staff in that teacher's classroom, (4) referencing Student, and (5) including all audio, video or other recordings of Student. The declaration of Student's counsel included in the SDT states that the records sought are "material" to the "proper presentation" of Student's case, and that good cause exists for their production because "the information…is relevant to the issues in this case, including whether the District appropriately implemented Student's IEP."

District moves to quash the SDT on grounds that the records sought are (i) outside the scope of the jurisdiction of the Office of Administrative Hearings (OAH), (ii) confidential and privileged, and (iii) not relevant or likely to lead to relevant evidence.

No Reasonable Necessity for Production Shown

The standard for issuance of an SDT in a special education due process proceeding is "reasonable necessity" (Cal. Code of Regs., tit. 5, § 3082, subd. (c)(2)), which requires a

specific showing that the requested documents are reasonably necessary for the requesting party to present a case at hearing. This standard is stricter than the general APA standard of "good cause" for issuance of SDT's, adopted from Code of Civil Procedure, which states that:

> A copy of an affidavit shall be served with a subpoena duces tecum . . ., showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control.

(Code of Civ. Proc., § 1985, subd. (b) [adopted into the APA at Gov. Code § 11450.20, subd. (a)].)

Student's SDT falls far short of demonstrating good cause for production of the documents requested, let alone of establishing the stricter standard of reasonable necessity. First, the SDT limits itself to a showing of mere "relevance" to Student's case, which does not rise to the standard of materiality or reasonable necessity. Second, the SDT states that the documents sought are for the "proper presentation" of, rather than material or reasonably necessary to, Student's case. Third, although the SDT also makes a conclusory statement that the items sought are "material," the SDT fails to provide detailed support for that conclusion, and fails to comply with Code of Civil Procedure, section 1985, subdivision (b), by specifying documents in broad categories, instead of specifying the "the exact matters or things" to be produced. Some of the categories, such as documents "relating to any investigations…into Student" and "all documents (including email) referencing student" are virtually incomprehensible, or so vague as to be rendered virtually meaningless, rather than material to Student's case.

Neither the SDT not Student's opposition to District's motion to quash have shown that any of the items sought are reasonably necessary to the issues in this case. The issues in this case involve the IEP of a single child, and whether the District provided a free appropriate public education to that child. As part of this inquiry, there is an issue as to whether District implemented Student's IEP. However, "investigations" of Student of unspecified subject or scope; evaluations or reprimands of a teacher or classroom staff, particularly as to activities not involving Student's IEP or involving other students; and documents or recordings referencing Student in any manner (be it a school directory, newsletter, yearbook, art project or any other of innumerable documents typically found in a school that reference students), have little or nothing to do with whether District implemented Student's IEP. The statement in the SDT that such items are "relevant to the issues" is insufficient to establish that such items are reasonably necessary for Student to present his case at hearing.

On its face, the issue raised by Student's complaint should be capable of being addressed by documents in Student's educational records or by testimony at hearing on such

matters as provision of behavior support in Student's classroom. Educational records include information directly related to a student and should sufficiently record the provision of services to Student, and Student's progress or lack of progress in his educational program, for purposes of hearing. Neither the SDT nor Student's opposition establish that such information is not available to Student in his educational records. In fact, the SDT states that Student "understand[s] that [District has] maintained records regarding District staff and their interactions with Student," but fails to provide details showing a reasonable necessity for seeking production beyond Student's educational records. Instead, the SDT seeks such documents as emails and investigative reports not maintained in Student's educational records, which the California courts have found to be the type of document "not directly related to the private educational interests of the student." (*BRV* at p. 755; see also *S.A.* at pp. *5-7.)

Moreover, the parties are required to exchange documents they intend to rely on at hearing, such that Student will have notice of any District document not otherwise contained in Student's educational records.

Accordingly, for the reasons set forth above, Student has failed to make a threshold showing that the documents requested in the SDT are reasonably necessary for hearing, and District's motion to quash is granted.

Issues of Privacy and Overbreadth Not Reached

District argues that the categories of items sought by Student's SDT are overbroad and burdensome, and not subject to production as confidential or privileged. However, as the SDT is quashed due to Student's failure to show reasonable necessity for production, there is no need to reach District's specific objections to individual categories of production sought.

Similarly, this order does not reach District's argument that certain documents sought are "outside" of OAH jurisdiction because "OAH's limited jurisdiction does not include jurisdiction that grants a remedy that specifically conflicts with teacher employment/union rights regarding the assignment of District personnel." This argument appears to be an attempt to object to certain categories of items sought in the SDT on the grounds of relevancy, rather than a jurisdictional claim. As explained above, District's specific objections to each category of items sought within the SDT are not reached, as the SDT is quashed in its entirety due to a lack of the requisite threshold showing.

ORDER

1. Student's subpoenas duces tecum, dated June 26, 2014, and directed to Newport-Mesa Unified School District, is quashed in its entirety.

2. This order is made without prejudice to Student seeking issuance of a subpoena duces tecum by the ALJ assigned to hear this matter at the prehearing conference and upon a showing of reasonable necessity.

DATE: July 25, 2014

/s/
ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings